

## Scottish Parliament Region: Highlands and Islands

### Case 200501381: Comhairle nan Eilean Siar

#### Introduction

1. On 5 December 2005 the Ombudsman received a complaint from Ms C against Comhairle nan Eilean Siar (the Council), concerning the way in which they handled two planning applications she had submitted earlier in the year.

2. The complaints which I have investigated (*and my conclusions*) are:

- (a) without advising the complainant, the Council instructed the contractor to cease work or be fined and imprisoned (*not upheld, see paragraph 10*);
- (b) failure to take action on an Enforcement Notice which had been incorrectly served (*not upheld, see paragraphs 13 and 14*);
- (c) the Council were selective in the information they submitted to Committee in June 2005 (*not upheld, see paragraph 20*);
- (d) failure to respond to correspondence, in particular, a letter to the Chief Executive dated 25 August 2005 (*upheld, paragraph 21*); and
- (e) failure to keep the complainant updated about a report to the Procurator Fiscal (*not upheld, see paragraph 23*).

3. Specific recommendations the Ombudsman is making resulting from this investigation are that the Council should:

- i. make a written apology to Ms C; and
- ii. reaffirm to staff their policy of replying to all correspondence within defined time limits.

4. I am pleased to note that the Council have confirmed that they will carry out these recommendations by apologising to Ms C and reaffirming their staff policy on responding to correspondence.

#### **Investigation and findings of fact**

5. The investigation of this complaint involved obtaining and reading all the relevant documentation, including correspondence between Ms C and the Council. I have also had sight of Enforcement and Stop Notices addressed to Ms C dated 9 May 2005 with accompanying notes for appellants; extracts from the Council's structure plan relating to listed buildings; a report to the Environmental Services Committee dated 16 June 2005 (the Report) and photographs of the development site provided by the complainant. A written enquiry was also made of the Council on 11 January 2006 and their detailed response was received on 27 February 2006.

#### **(a) Without advising the complainant, the Council instructed the contractor to cease work or be fined and imprisoned**

6. Ms C said that, on 16 March 2005, she had two planning applications lodged with the Council: application 05/00082, a full planning application to erect a house; and application 05/00161, for listed building consent to demolish some byres. She complained that in May 2005, without her knowledge, her contractor was instructed to cease work or he would be fined or imprisoned.

7. The Council's Planning Officer maintained that the situation concerning the listed byres had been discussed with the complainant on numerous occasions since the summer of 2003 and, amongst the information provided in their response of 27 February 2006, there was a chronology of events prepared by their Planning Officer. This showed that on 22 February 2005 the Planning Officer spoke to Ms C at a Building Standards Regulations meeting and informed her that she could not legally go ahead with the proposed demolition of the byres and the erection of a house without getting all the relevant consents. Two days later the same officer wrote informing Ms C that if she proceeded with the demolition of the listed byres without listed building consent then she would have committed a criminal offence and court action may be taken. A further letter was sent on 28 April 2005, advising against the demolition of listed buildings and warning of the potential consequences. The Council said that this letter was 'signed for' so that they were

confident that it had reached its destination.

8. The chronology also showed that the Planning Officer advised the contractor involved, on 27 April 2005 and 5 May 2005, that demolition works could lead to prosecution proceedings but the Officer said it was clear that any action would be taken against Ms C, not the contractor. The Officer denied that she made any suggestion that the contractor could be liable for a fine or imprisonment.

9. Meanwhile, the Council had been advised that the byres had been demolished on 4 May 2005 and the Planning Officer therefore visited the site the next day to confirm the situation. It was then that she spoke to the contractor. The Council said that they made attempts to speak with Ms C after she heard of the demolition but they were unable to do so. Although Ms C visited the Council Offices on 5 May 2005 to discuss her building warrant, the Planning Officer was out of the office. When she returned Ms C had left the island for a few days and it was on her return when she spoke to the contractor that she learned that work had been stopped. Formal notification of the situation was sent by way of Enforcement and Stop Notices dated 9 May 2005.

*(a) Without advising the complainant, the Council instructed the contractor to cease work or be fined and imprisoned : Conclusions*

10. I am satisfied that Ms C was advised by Council officers that she should not remove the listed byres without obtaining the appropriate permission. The personal consequences of doing so were made clear. However, the complainant's contractors were working on the site and information received led the Planning Officer to visit on 5 May 2005. In the circumstances, I believe that it was reasonable for the officer to speak directly to the contractor. Given the correspondence which had gone before, I would think it quite unlikely that the Planning Officer would have threatened the contractor with legal proceedings with regard to the demolition, as she knew that any possible penalty applied to the Ms C and not the contractor. In the circumstances, I do not uphold this aspect of the complaint.

**(b) Failure to take action on an Enforcement Notice which had been incorrectly served**

11. The Council served Ms C with Planning Enforcement and Stop Notices on

9 May 2005 and Ms C appealed them both. They have confirmed that they did **not** serve a Listed Building Consent Enforcement Notice, although Ms C appears to have submitted an appeal on this score and about which the Scottish Executive Inquiry Reporters Unit (SEIRU) wrote on 26 May 2005 (saying that it was invalid not having been properly served).

12. With regard to the Planning Enforcement Notice which was served and appealed by Ms C, SEIRU wrote on 22 August 2005 saying that it was invalid and had no effect because it did not contain a specific date by which the work on site had to cease. In their response to me of 27 February 2006, the Council said that they then had to consider whether to withdraw the Notice and re-serve it but, as Ms C had then decided to build her house on a site which did not affect the listed buildings and for which she already had planning permission, the view was taken that it would not have been expedient to re-serve the Notice. They said that they did not formally withdraw this Notice because SEIRU's view on its invalidity had already been clearly stated to Ms C.

*(b) Failure to take action on an Enforcement Notice which had been incorrectly served: Conclusions*

13. Ms C said that, because the Council did not withdraw the listed building enforcement Notice after SEIRU's letter of 26 May 2005, she had to maintain her appeal to her financial detriment. However, she had not in fact received a Listed Building Consent Enforcement Notice so it was, therefore, unclear to me why she appealed one or why SEIRU wrote on this matter. In the circumstances, the Council could not be required to withdraw a Notice which had not been issued and cannot be considered responsible for any costs Ms C said she incurred.

14. Thereafter, Ms C was notified on 22 August 2005 that the Planning Enforcement Notice which had been served on her was invalid and, in their response of 27 February 2006, the Council explained their reasons for not withdrawing it (see paragraph 12). Ms C said she was obliged to build on an alternative site (for which she already had planning permission), but it seems to me that her decision to do so had already been made. Accordingly, I do not uphold this complaint.

**(c) The Council were selective in the information they submitted to Committee in June 2005**

15. Ms C said that, despite not agreeing to the Council's request, made on 28 April 2005, for an extension of time to consider her applications, it was not until June 2005 that the Environmental Services Committee considered them. At this point, she said, the Planning Officer submitted a report recommending refusal on both applications, together with a recommendation that the Procurator Fiscal be advised of the unlawful demolition of the listed byres. Ms C alleged that this report was extremely selective, as she felt that she had already demonstrated to the Council that the byres had been in a dilapidated condition for some time, which was then exacerbated by a hurricane in early January 2005. She maintained that she had not instructed demolition works to begin but that her builder had started work in an effort to be helpful. She said that this information was never passed to the Committee. She also complained that some of the information contained in the report was incorrect. Ms C said that she was ultimately advised in July 2005 that her applications had been refused and she believed that these decisions had been influenced by the incorrect information contained in the Planning Officer's report.

16. The Council said that there was no planning objection in principle to planning permission to erect a house on the croft, except that in this case it involved the demolition of listed byres. They said they, therefore, took the view proposed in the Report of 16 June 2005, that in the circumstances it would be inappropriate and premature to grant approval as that would allow development on the site of the byres to proceed while the Council were still investigating their unlawful demolition. The Committee therefore agreed to recommend that that the application be refused, as the house proposed could not be built without the demolition of the byres. Although it was acknowledged that the Council could defer their decision until after the situation with the byres was dealt with, this was not considered appropriate in light of Ms C's failure to agree their request for a time extension to deal with the application.

17. With regard to Ms C's retrospective application for listed building consent to demolish the byres, the Report to Committee said that such an application should include additional information, including confirmation that alternatives to demolish had been considered, information about whether the applicant had tried to sell or lease the property and a structural survey of the condition of the buildings. It was

reported that, although Ms C had been asked to provide this information, she had not done so. Ms C denies this, saying she was never asked, but I understand from the detailed chronology provided by the Council, that, during conversations between Ms C and the Planning Officer and the Head of Development Services, she was advised that any application for listed building consent to demolish should be supported by justification to meet the relevant Development Plan policy and National Guidance.

18. Nevertheless, the Council said that while no supporting information was provided which could have been passed to the Committee on 16 June 2005, Ms C did make further comment and provided photographs in a letter addressed to 'All Councillors, CNE-Siar' of 27 June 2005. This was then circulated, in full, to all members prior to their meeting of 29 June 2005. This meeting was to consider, amongst other things, the recommendation of the Environmental Services Committee to refuse Ms C's applications. The full Council ultimately refused Ms C's applications.

19. Although Ms C contended that the photographs she provided illustrated the dilapidated condition of the byres over the preceding year, the Council judged that the potential to repair these buildings remained. They said that their view in this was supported by Historic Scotland, who commented on Ms C's application for listed building consent saying that, 'Our views on this matter have not changed since our letter of 25 November 2003 ... while we believe the listed thatched buildings are now ruinous, they still form a part of [the island's] built heritage and may be capable of restoration in the future, as has happened elsewhere'.

*(c) The Council were selective in the information they submitted to Committee in June 2005: Conclusions*

20. From the information in paragraphs 15 to 19 above, I am satisfied that Ms C was advised to provide information supporting her application. The application form makes provision for this. She did not do so and this was a matter for her judgement. She believed, however, that officers were partial in the information they submitted to the Environmental Services Committee but I am not convinced. Furthermore, I am satisfied that, before agreeing the Committee's recommendations on her applications, the full Council were aware of her views on the Report and saw the photographs she provided. I, therefore, do not uphold

Ms C's complaint.

**(d) Failure to respond to correspondence, in particular, a letter to the Chief Executive dated 25 August 2005**

21. Ms C said that she had tried to complain to the Council about the way in which they handled her planning applications but that her correspondence, in particular her letter of 25 August 2005, failed to receive a reply. In their response to me of 27 February 2006, the Council said that, while Ms C's letter was acknowledged, and considered by Council officers, it failed to receive a substantive reply. This is a service failure and is contrary to the Council's own stated policy to acknowledge all correspondence within three working days, with a substantive reply being provided in 15 working days. The Ombudsman, therefore, recommends that the Council provide a written apology to Ms C for this service failure and to reaffirm their policy to staff.

**(e) Failure to keep the complainant updated about a report to the Procurator Fiscal**

22. Ms C was advised that, should she demolish the listed byres without the appropriate consent, there may be legal penalties (see paragraphs 7 and 8). The explanatory notes accompanying an Enforcement Notice also spell this out. I am of the view that Ms C was aware of the consequences of any unauthorised action taken by her, or on her behalf, with regard to the byres. The Report recommended that a report be passed to the Procurator Fiscal and this action was agreed by the full Council on 27 June 2005. Ms C was aware of that decision.

*(e) Failure to keep the complainant updated about a report to the Procurator Fiscal: Conclusions*

23. On 15 August 2005, Ms C wrote to the Planning Officer asking to be advised of the timescales involved by which she could expect to learn of the outcome of contact with the Procurator Fiscal. She was advised that it was likely that the Council would submit a report to the Procurator Fiscal by about mid-September 2005. Thereafter, the process would be for the Procurator Fiscal to decide. The Council have confirmed to me that this action was taken and maintained that Ms C has since been kept informed. In this regard they referred to a conversation between Ms C and the Head of Development Services at the end of 2005. At that point it was suggested that, although it was thought unlikely that

prosecution would follow, a letter in connection with the listed byres may be sent. Although Ms C is aggrieved that the matter remains outstanding, this is not a matter within the Council's control. I am satisfied that the complainant was kept up-to-date as far as the Council's actions in this regard were concerned and I do not uphold her complaint.

**Further action**

23. As noted in paragraph 4, the Council have confirmed that they will carry out the Ombudsman's recommendations by apologising to Ms C and reaffirming their staff policy on responding to correspondence.

27 June 2006



**Explanation of abbreviations used**

Ms C	The complainant
The Council	Comhairle nan Eilean Siar
The Report	Report to the Environmental Services Committee dated 16 June 2005
SEIRU	Scottish Executive Inquiry Reporters Unit